Supreme Court, U.S.
FILED
APR 28 2003
OFFICE OF THE CLERK

(1) No. 02-1595

In The

Supreme Court of the United States

CHARLES LEE RUTTER,

PETITIONER

v.

STATE OF MISSOURI

On Petition For Writ Of Certiorari
To The Missouri Supreme Court

PETITION FOR WRIT OF CERTIORARI

Joseph L. Bauer, Jr.
Counsel of Record
Bauer & Baebler, P.C.
1010 Market Street
Suite 350
St. Louis, Missouri 63101
(314) 241-7700

28 pp

QUESTIONS PRESENTED

1. Whether the prosecuting attorney is permitted to introduce evidence obtained in violation of Mr. Rutter's Fourth Amendment rights in the State's case-in-chief or in rebuttal as substantive evidence of guilt or whether same may be used only as impeachment evidence.
2. Whether the appropriate standard of review in determining if a constitutional trial error mandates reversal of Mr. Rutter's convictions where it involves the prosecution's presentation of illegally obtained evidence in its case-in-chief is by a reasonable probability that it did not change Mr. Rutter's verdict or whether the appropriate standard is that an appellate court must be convinced beyond a reasonable doubt that it did not change the verdict entered at Mr. Rutter's trial.

PARTIES TO PROCEEDING

The parties to the proceeding are set forth in the caption to this case and are Petitioner, Charles Lee Rutter, with Joseph L. Bauer, Jr., the counsel of record, Terry J. Flanagan, and John W. Peel. The Respondent is the State of Missouri, and is represented by the Missouri Attorney General's Office, Jeremiah W. (Jay) Nixon and Breck K. Burgess.

TABLE OF CONTENTS

Questions Presented i
Parties to the Proceeding ii
Table of Contents iii
Table of Authorities iv
Citations to Official Reports vi
Basis of Jurisdiction vii
Constitutional Provisions viii
Argument
Statement of the Case 1
First Question Presented 4
Second Question Presented 10
Conclusion 14
Appendix filed separately

TABLE OF AUTHORITIES

Constitutional

U.S. Const. amend IV. 4

U.S. Const. amend V. 4, 10

U.S. Const. amend. XIV. 4, 10

Case Law

Agnello v. United States, 269 U.S. 20, 46 S.Ct. 4 (1925) 7

Bumper v. North Carolina, 391 U.S. 543, 88 S.Ct. 1788, 1792 (1968) 11

Byars v. United States, 273 U.S. 28, 47 S.Ct. 248 (1927) 11

Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, (1970) 11

Chapman v. California, 386 U.S. 18, 87 S.Ct. 824 (1967) 11

Fahy v. State of Connecticut, 375 U.S. 85, 84 S.Ct. 229, 230 (1963) 11

Harris v. New York, 401 U.S. 222, 91 S.Ct. 643 (1971) 6, 7

James v. Illinois, 493 U.S. 307, 110 S.Ct. 648 (1990)..... 6, 7, 8

Kuntz v. McCaughtry, 806 F.Supp. 1373 (E.D. Wis. 1992) 8

Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684 (1961) 11

Oregon v. Hass, 420 U.S. 714, 95 S.Ct. 1215 (1975) 6, 7

People v. Trujillo, 49 P.3d 316, 319

(Co. 2002)..... 5
State vs. Kinkead, 983 S.W.2d 518
(Mo. 1998) 12
United States v. Havens, 446 U.S. 620,
100 S.Ct. 1912 (1980)..... 6, 7
Walder v. United States, 347 U.S. 62,
74 S.Ct. 354 (1954) 6, 7

Secondary Sources

1 John W. Strong, *McCormick on Evidence* § 33 (5th Ed. 1999) 5

CITATIONS TO OFFICIAL REPORTS

State v. Charles Rutter, 2002 WL 713246 (Mo. Ct. App. April 25, 2002)

State v. Charles Rutter, 93 S.W.3d 714 (Mo. 2002)

BASIS OF JURISDICTION

Mr. Rutter seeks review of the Missouri Supreme Court's decision entered on December 24, 2002, which affirmed his convictions for Murder in the First Degree and Armed Criminal Action. Mr. Rutter timely filed a Motion for Rehearing/Reconsideration, and same was denied on or about January 28, 2003. Thus, this Court properly possesses jurisdiction to review this matter pursuant to 28 U.S.C. § 1257 and other like statutes.

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. IV.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. V.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the

same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend XIV.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its

jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On June 29, 2000, the Petitioner, Mr. Charles Rutter, was found guilty by a jury of Murder in the First Degree and Armed Criminal Action for events occurring on April 4, 1999. Mr. Rutter received a sentence of life imprisonment without the possibility of probation or parole on each count, with these sentences to run concurrently.

On April 4, 1999, Mr. Hinkle was shot one (1) time by Mr. Rutter and subsequently died. The pertinent facts were that Mr. Hinkle destroyed Mr. Rutter's home, physically attacked him and threatened to kill Mr. Rutter. Mr. Hinkle then went to the living room closet in order to locate a long-gun contained therein. Despite Mr. Rutter's requests, Mr. Hinkle continued to reach for the firearm and Mr. Rutter was forced to shoot him in self-defense.

The local law enforcement officers responding to the shooting call entered Mr. Rutter's home. After the securing of the residence, the law enforcement personnel conducted a thorough search of the home, including a search of the living room closet. These same officers testified that there were no firearms contained therein.

Mr. Rutter testified that there were three (3) firearms in that closet on April 4, 1999, and also presented the testimony of Nelson Dean, Gina Warren, Billy Joe Luten, Donald Wright, and Doug Bond where each witness stated that he or she observed these long guns on that date. Thus, the

issue of the contents of this closet was critical to Mr. Rutter's presentation of self-defense.

Based upon the foregoing illegally obtained evidence, which was presented in the State's case-in-chief, the State argued in closing that Mr. Rutter "shot an unarmed man." Moreover, in discussing the search of the closet, the State argued that the officer recalled the "dimensions of that closet were down to 3/8 of an inch ... But he's on his hands and knees in there and he sees no guns."

Following the jury's guilty verdicts, Mr. Rutter timely filed his Motion for New Trial, which, once again, complained of the warrantless search of his home, but this Motion was subsequently denied. A Notice of Appeal was filed to the Southern District of the Missouri Court of Appeals where Mr. Rutter requested review of the trial court's ruling on the Motion to Suppress Evidence. On April 25, 2002, the Court of Appeals affirmed the trial court's ruling, including the Motion to Suppress Evidence issue, and thereby affirmed Mr. Rutter's convictions. A timely Motion for Reconsideration was then filed with the Court of Appeals, but said request was denied on May 16, 2002.

Mr. Rutter filed his Motion for Transfer to the Missouri Supreme Court and same was granted on or about June 25, 2002. The Missouri Supreme Court entered its decision on December 24, 2002, holding that the search of Mr. Rutter's closet was unlawful and in violation of Mr. Rutter's rights bestowed upon

him by the Fourth Amendment, and that Mr. Rutter had preserved this issue for appellate review. That Court, when discussing whether Mr. Rutter was prejudiced by this unlawful search, recognized that "[t]he existence or non-existence of weapons in the closet was integral to Appellant's claim that he acted in self-defense." Ultimately, the Missouri Supreme Court held that the trial court error was harmless because "[t]here is no reasonable probability that the State's presentation of the evidence in its case-in-chief as opposed to rebuttal changed the verdict."

Mr. Rutter filed his Motion for Reconsideration on or about January 7, 2003. In said Motion, Mr. Rutter brought to the Court's attention that the decision improperly allows illegally obtained evidence to be used as substantive evidence of guilt and said decision does not limit the use of this evidence to impeachment evidence only. Mr. Rutter, through his Motion, also complained "[t]hat the Court's opinion fails to find that harmless error was present beyond a reasonable doubt but rather only finds that said error was present in the opinion of the Court by a 'reasonable probability.'"

Mr. Rutter's Motion for Consideration was denied on or about January 28, 2003. This Petition for Writ of Certiorari follows.

ARGUMENT

1. Whether the prosecuting attorney is permitted to introduce evidence obtained in violation of Mr. Rutter's Fourth Amendment rights in the State's case-in-chief or in rebuttal as substantive evidence of guilt or whether same may be used only as impeachment evidence.

The first question presented to this Court is whether evidence of law enforcement officers' observations, which were made and seized in violation of Petitioner's Fourth Amendment rights, may be admitted as substantive evidence of his guilt during the State's case-in-chief and/or in the State's rebuttal.

The Fourth Amendment of the United States Constitution guarantees that individuals shall be free from unreasonable searches and seizures. U.S. Const. amend IV. The Fifth Amendment of the United States Constitution provides that individuals shall enjoy due process of law. U.S. Const. amend V. The Fourteenth Amendment of the United States Constitution also requires that State's provide due process of law and enforce the provisions of the United States Constitution. U.S. Const. amend. XIV. Unfortunately, these same rights were ignored in Mr. Rutter's case.

At Mr. Rutter's trial, the State, in its case-in-chief and through direct examination, presented evidence that at least two (2) separate officers conducted a search of Mr. Rutter's closet, and

through that search they concluded that no weapons were contained therein. State v. Rutter, 93 S.W.3d 714, 721 (Mo. 2002). The Missouri Supreme Court held that "the evidence of the observations of Deputies Helton and Young as to the contents of the closet was seized in violation of the Fourth Amendment, and no exceptions applied, and it was error to allow the State to present the evidence in its case-in-chief." Id. at 728. However, the Missouri Supreme Court also stated the following:

> Regardless of the trial court's error in allowing the disputed evidence to be presented in the State's case-in-chief, the evidence would have been admissible as rebuttal evidence had the trial court not erred. There is no reasonable probability that the State's presentation of the evidence in its case-in-chief as opposed to rebuttal changed the verdict.

Id. at 728-729. In other words, the Missouri Supreme Court believed that no prejudice was suffered by Mr. Rutter in the State's presentation of this evidence in its case-in-chief and that same may be used as

substantive evidence[1] of his guilt in either the State's case-in-chief and/or rebuttal.

In United States v. Havens, 446 U.S. 620, 100 S.Ct. 1912 (1980), this Court discussed the manner in which illegally obtained evidence may be used at a criminal trial. Ultimately, this Court concluded that evidence seized in violation of the Fourth Amendment may be used to impeach a testifying defendant. Id. at 627-628. In so holding, this Court stated that "the ends of the exclusionary rules were thought adequately implemented by denying the

---

[1] Impeachment evidence may be defined as evidence "used to attack the truth-telling capacity of a witness." People v. Trujillo, 49 P.3d 316, 319 (Co. 2002) citing 1 John W. Strong, *McCormick on Evidence* § 33 (5th Ed. 1999). While, rebuttal evidence is generally used to contradict an adverse witness or a party's presentation of contradictory evidence or arguments. Trujillo, 49 P.3d 320 (stating that "[t]his type of rebuttal evidence is generally substantive in nature, may support the party's case-in-chief ... and is presented after the opposing party has presented its evidence"). Mr. Rutter further submits that the Missouri Supreme Court clearly understood this distinction in light of their discussion of Mr. Rutter's Motion for New Trial based upon the Mr. Tony Cole's error in testimony.

government the use of the challenged evidence to make out its case in chief." Id. at 627. Moreover, this Court explicitly stated that such illegally obtained evidence may not be used in "the government's direct case, or otherwise, as substantive evidence of guilt." Id. at 628.

In James v. Illinois, 493 U.S. 307, 110 S.Ct. 648 (1990), this Court addressed the issue of illegally obtained statements made by a criminal defendant during trial, and whether same may be used to impeach a witness other than the defendant. In that case this Court stated that said statements may be used "for the limited purpose of impeaching the credibility of the defendant's own testimony." Id. at 312. The Court further stated, relying upon Walder v. United States, 347 U.S. 62, 74 S.Ct. 354 (1954), Harris v. New York, 401 U.S. 222, 91 S.Ct. 643 (1971), Oregon v. Hass, 420 U.S. 714, 95 S.Ct. 1215 (1975), and United States v. Havens, 446 U.S. 620, 100 S.Ct. 1912 (1980), "[t]his Court insisted throughout this line of cases that 'evidence that has been illegally obtained ... is inadmissible on the government's direct case, or otherwise, as substantive evidence of guilt." Id. at 313. This Court reaffirmed its prior holdings of impeachment use only and refused to provide yet another exception to the use of illegally obtained evidence at trial, and thereby disallowed the use of tainted evidence to impeach a witness other than a testifying defendant. Id. at 320.

In each case reviewed by Mr. Rutter involving

the usage of illegally obtained evidence, it appears that this Court engages in a competing interests review balancing the purpose of the exclusionary rule and society's interest in seeking the truth. Originally, this Court in Agnello v. United States, 269 U.S. 20, 35, 46 S.Ct. 4, 7 (1925), held that illegally obtained evidence may not be used whatsoever at a criminal trial. This absolute usage bar was curtailed by this Court's decisions in Walder v. United States, 347 U.S. 62, 74 S.Ct. 354 (1954), which permitted the use of evidence obtained in violation of the Fourth Amendment to impeach the direct testimony of a testifying defendant. The bar to use was once again lessened in Harris v. New York, 401 U.S. 222, 91 S.Ct. 643 (1971), and Oregon v. Hass, 420 U.S. 714, 95 S.Ct. 1215 (1975), which both permitted the use of illegally obtained statements to impeach a testifying defendant. Then again in United States v. Havens, 446 U.S. 620, 100 S.Ct. 1912 (1980), this Court condoned the use of evidence obtained in violation of the Fourth Amendment to impeach a testifying defendant. However, in James v. Illinois, 493 U.S. 307, 110 S.Ct. 648 (1990), this Court refused to extend the impeachment exception to witnesses other than the defendant. It must be noted that none of the aforementioned cases condoned the use of this evidence as substantive evidence of guilt, and limited the usage to impeachment only.

When discussing these competing interests, the Havens Court, relying upon Walder, Harris, and

Hass, stated that "the ends of the exclusionary rules were thought adequately implemented by denying the government the use of challenged evidence to make out its case in chief." 446 U.S. at 627. In fact, this Court stated in James that allowing the use of this tainted evidence to impeach a testifying defendant furthered the truth seeking process but did not frustrate the purpose of the exclusionary rule and the "balances of values underlying the exclusionary rule justified an exception covering impeachment of defendants' testimony." 493 U.S. 313. Thus, this Court only permits the use of illegally obtained evidence to impeach a testifying defendant because any further usage would frustrate the exclusionary rule. Now the question before this Court in the case at bar is whether use of illegally obtained evidence as substantive evidence of guilt in the State's case-in-chief and/or rebuttal is a proper extension of this Court's prior decisions.

In the case at bar, and in contravention with this Court's competing interest concerns, the Missouri Supreme Court's decision renders the exclusionary rule a figment of imagination, with absolutely no deterrent effect whatsoever. See James, 493 U.S. at 313-314 (refusing to extend use of illegally obtained evidence against witnesses other than a defendant because the "expansion would not promote the truthseeking function to the same extent as did creation of the original exception, and yet it would significantly undermine the deterrent effect of

the general exclusionary rule [in fact] the proposed expansion would frustrate rather than further the purposes underlying the exclusionary rule").

Ultimately, and practically, Mr. Rutter's Fourth, Fifth and Fourteenth Amendment rights were the subject of judicial nullification despite the fact that his life hangs in the balance. Mr. Rutter certainly did not enjoy any Fourth Amendment protections regarding the search of his home and the State suffered no consequence as a result of its constitutionally invalid search. In fact, the officers testified freely during the State's case-in-chief of their search and the tainted fruits therefrom. Mr. Rutter submits that actual application of the Missouri Supreme Court's decision renders his Fourth Amendment rights non-existent and overrules this Court's exclusionary rule as it played no role in his case. See Kuntz v. McCaughtry, 806 F.Supp. 1373, 1380 (E.D. Wis. 1992) citing James, 493 U.S. at 319, 110 S.Ct. at 655 (stating that "[s]o long as we are committed to protecting the people from the disregard of their constitutional rights during the course of criminal investigations, inadmissibility of illegally obtained evidence must remain the rule, not the exception.")

In accord with this Court's prior decisions, Mr. Rutter submits that the illegally obtained observations in question, at best, may be used only as impeachment evidence against Mr. Rutter's own testimony and not as substantive evidence of his

guilt. Mr. Rutter is aware of no case, other than the decision by the Missouri Supreme Court in this matter, that condones or forgives the presentation of illegally obtained evidence in the prosecution's case-in-chief or in rebuttal as substantive evidence of a defendant's guilt. It is Mr. Rutter's contention that the manner in which this illegally obtained evidence was used violated his Fourth, Fifth and Fourteenth Amendment rights bestowed upon by the United States Constitution and that his convictions for Murder in the First Degree and Armed Criminal Action, for which he is now a life-long prisoner of the Missouri Department of Corrections, must be reversed.

In conclusion, Mr. Rutter suggests that Missouri Supreme Court's decision permitting the use of illegally obtained evidence as substantive evidence of guilt in the State's case-in-chief and/or in rebuttal is in error. Therefore, Mr. Rutter prays for an Order of this Court granting his Petition for Writ of Certiorari in order to review the issue presented and so that he may present same fully to this Court.

2. **Whether the appropriate standard of review in determining if a constitutional trial error mandates reversal of Mr. Rutter's convictions where it involves the prosecution's presentation of illegally obtained evidence in its case-in-chief is by a reasonable probability that it did not change Mr. Rutter's verdict or whether the appropriate standard is that an appellate court must be convinced beyond a reasonable doubt that it did not change the verdict entered at Mr. Rutter's trial.**

The next question presented to this Court is what level of belief must an appellate court possess in determining whether a constitutional trial error involving the admission of illegally obtained evidence as substantive evidence of guilt would "change" Mr. Rutter's guilty verdict; reasonable probability or beyond a reasonable doubt.

The Fifth Amendment of the United States Constitution provides that individuals shall enjoy due process of law. U.S. Const. amend V. The Fourteenth Amendment of the United States Constitution also requires that State's provide due process of law and enforce the provisions of the United States Constitution. U.S. Const. amend. XIV.

In the case at bar, the Missouri Supreme Court found that constitutional error was present in that the State was allowed to admit evidence in its case-in-chief that was obtained in violation of the Fourth

Amendment. Rutter, 93 S.W.3d at 728. However, in affirming Mr. Rutter's convictions, the Missouri Supreme Court held that "[t]here is no reasonable probability that the State's presentation of the [tainted] evidence in its case-in-chief as opposed to rebuttal changed the verdict." Rutter, 93 S.W.3d 714, 728-729 (Mo. 2002). In other words, the Court held that it was reasonably probable that Mr. Rutter would be convicted once again if this matter were retried and the evidence were allowed only in rebuttal as substantive evidence of guilt.

This Court in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824 (1967), discussed the standard of review regarding constitutional trial court error. In that case, the Court stated that where a criminal defendant suffers a denial of the "rights rooted in the Bill of Rights" the issue becomes that of a federal question, and is then subject to the federal harmless constitutional error standards. Id. at 21. The Court then stated that constitutional error review that an appellate court must employ is "'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction,'" and, if it did contribute, the convictions must be reversed. Id. at 23 citing Fahy v. State of Connecticut, 375 U.S. 85, 86-87, 84 S.Ct. 229, 230 (1963). In other words, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Id. at 24. One example provided by the Court requiring

this beyond a reasonable doubt standard is where the error involves illegally admitting highly prejudicial evidence or comments. Id.

In Mapp v. Ohio, 367 U.S. 643, 649 81 S.Ct. 1684, 1688 (1961), this Court stated that the exclusionary rule is of constitutional origin. In fact, the Mapp Court stated that illegally obtained evidence cannot be tolerated. Id. citing Byars v. United States, 273 U.S. 28, 47 S.Ct. 248 (1927). Thus, the error involving the enforcement of the exclusionary rule is constitutional error requiring the application of the beyond a reasonable doubt standard, and not one of reasonable probability. See also Chambers v. Maroney, 399 U.S. 42, 52-53, 90 S.Ct. 1975, 1981-1982 (1970) (applying constitutional harmless error beyond a reasonable doubt standard to admission of evidence seized in violation of the Fourth Amendment); Bumper v. North Carolina, 391 U.S. 543, 550, 88 S.Ct. 1788, 1792 (1968) (holding that illegally obtained firearm presented in the prosecution's case-in-chief was not harmless error).

As set forth above, in affirming Mr. Rutter's convictions, the Missouri Supreme Court held that "[t]here is no reasonable probability that the State's presentation of the [tainted] evidence in its case-in-chief as opposed to rebuttal changed the verdict." Rutter, 93 S.W.3d 714, 728-729 (Mo. 2002). In other words, the Court held that it was reasonably probable that Mr. Rutter would be convicted once again if this matter were retried and the evidence

were allowed only in rebuttal as substantive evidence of guilt.

As set forth above in the first question presented, Mr. Rutter believes that the illegally obtained evidence in question may not be used as substantive evidence of his guilt. Nonetheless, the Missouri Supreme Court's belief assumes that Mr. Rutter must testify in his own defense, that there is no other evidence available to establish his theory of self-defense, and that Mr. Rutter would, in fact, present his theory of self-defense during retrial. See State vs. Kinkead, 983 S.W.2d 518, 519 (Mo. 1998) (refusing to discharge defendant after sustaining motion to suppress on appeal because "[t]he State is entitled to rely on the trial court's erroneous ruling in determining what evidence to produce" and therefore the Court did not desire to assume that it was not possible there was some other evidence that would establish the defendant's culpability). Quite frankly, as Mr. Rutter's counsel, I cannot state that the above events will occur within a reasonable degree of probability, let alone beyond a reasonable doubt, in that a criminal defendant must await the presentation of the State's case-in-chief before a true decision is made as to what evidence must be presented.

In accord with Chapman, Mr. Rutter submits that the admission of illegally obtained evidence as substantive evidence in the State's case-in-chief where same involved an integral issue should be

subjected to this beyond a reasonable doubt harmless error review. This is not standard of review employed by the Missouri Supreme Court in reviewing this constitutional error.

The standard of review that the Missouri Supreme Court employed in Mr. Rutter's case is in conflict with the mandate of Chapman in that it is not whether it was reasonably probable that the verdict would change, but rather, whether it was reasonably probable that it contributed to Mr. Rutter's conviction. The Missouri Supreme Court's own finding that the verdict would not change gives rise to the conclusion that it was more than reasonably probable that this evidence contributed to Mr. Rutter's conviction, but rather contributed beyond a reasonable doubt.

Thus, the Missouri Supreme Court's standard of review in determining the severity of this constitutional trial error was improper. Therefore, Mr. Rutter, relying upon this Fifth and Fourteenth Amendment rights, prays that this Court grant his Petition for Writ of Certiorari so that it may review this issue.

CONCLUSION

Wherefore, in light of the foregoing, Mr. Rutter prays for an Order of this Court granting his Petition for Writ of Certiorari so that this matter may be reviewed and determined by this Court.